Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76–1516

WILLIAM MIRIN, dba STRIP CAB CO., and RAYMOND CHENOWETH, dba NELLIS CAB CO.,

Petitioners,

v.

THE STATE OF NEVADA ON RELATION OF ITS PUBLIC SERVICE COMMISSION; NOEL CLARK, EVO GRANATA and HEBER HARDY, acting in their official capacity; THE TAXICAB AUTHORITY OF CLARK COUNTY, a State Agency; MANUEL CORTEZ, JAMES JONES, JOE LaVOIE, and B. J. HANDLON, acting in their official capacity,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS

1. Whether the United States Court of Appeals for the Ninth Circuit was correct in ruling that denial of petitioners' Motion for Reconsideration did not constitute an abuse of discretion by the District Court.

2. Whether this petition is a proper vehicle for petitioners to use in seeking redress of a personal grievance against their former counsel.

STATEMENT

The pertinent facts of the case are set forth fully in the decisions of the District Court (Petitioners' Appendix B at pp. vii-xv) and the Court of Appeals (Petitioners' Appendix A at pp. ii-xii).

ARGUMENT

The respondents oppose the petition for a writ of certiorari on two grounds:

1. THE COURT OF APPEALS PROPERLY DECIDED THAT DENIAL OF RECONSIDERATION BY THE DISTRICT COURT OF ITS MEMORANDUM DECISION GRANTING SUMMARY JUDGMENT AGAINST PETITIONERS WAS NOT AN ABUSE OF ITS DISCRETION.

Approximately eight weeks after entry of the District Court's memorandum

opinion granting the summary judgment herein attacked, petitioners proffered to the District Court two uncorroborated affidavits of an ex-employee of one of petitioners' competitors. (R. 1020-1023) These affidavits were extended in support of petitioners' previously filed motion for reconsideration. Five and one-half months thereafter, having had ample opportunity to assess the probative value, credibility, and relevance, if any, of the affidavits, the District Court denied the motion for reconsideration and entered summary judgment as against petitioners herein. (Petitioners' Appendix B at pp. xxv-xxiv)

One of the affidavits is dated June 13, 1974. (R. 1021) This would suggest that petitioners awaited the initial disposition of their cause by means of the memorandum decision of the District Court, and then, upon discovering that the decision was not favorable and prior to entry of judgment, produced the affidavits in a desperate attempt to get the District Court to alter its decision, which had been made exclusively on facts to which petitioners had willingly stipulated.

The Court of Appeals characterized disposition of petitioners' request for reconsideration as lying within the discretion of the District Court. (Petitioners' Appendix A at p. vii) Petitioners admit this, but they contend that the District Court abused its discretion. This is the only point of dispute between petitioners and both the District Court and the Court of Appeals, yet petitioners' argument falls far short of justifying review of this issue on certiorari.

The appellate court, making an independent determination, deemed the bare affidavits to be of no significance with respect to the merits of petitioners' underlying claims. (Petitioners' Appendix A at p. vii) Certainly, rhetoric alone will not supplant the true indicia of credibility vital to elevating inherently suspect, self-serving affidavits to the level of proof necessary to satisfy the conditions of relief discussed in U.S. Throckmorton, 98 U.S. 61 (1878) upon which petitioners seek to rely. Thus, petitioners err at the outset by assuming the conclusion they seek, i.e. that their attorney sold out their interest to the other side. The Throckmorton test for relief from judgment requires both proof of fraudulent representation and a showing by petitioner that he ". . . has been prevented from presenting all of his case to the court." 98 U.S. at 66. Because petitioners satisfied neither of these mandatory parts of the Throckmorton test, both the District Court and the Court of Appeals elected properly to exercise their discretion in refusing to relieve petitioners from the valid, final judgment entered against them. Petitioners have offered no credible proof of the alleged sell-out by former counsel. Neither have they established any nexus between former counsel's actions and petitioners' claims in the District Court action, causes which the Court of Appeals deemed "meritless." (Petitioners' Appendix B at p. vii)

In addition to the afore-referenced considerations, this case is an inappropriate means of pursuing legal action against former counsel.

2. THE INSTANT PETITION IS NOT A PROPER VEHICLE FOR SEEKING REDRESS OF GRIEVANCES AGAINST FORMER COUNSEL.

Even apart from the above discussion relative to the proper exercise of discretionary functions by the courts, the instant petition should fail because it is an ancillary attempt by petitioners to redress a grievance presently being actively litigated in another forum. In Chenoweth et al. v. Hilbrecht, Case No. R 76-23 BRT in the United States District Court for the District of Nevada, these identical petitioners seek damages from their former counsel, averring in substance the same considerations which they now urge this Court to accept as proof that the District Court abused its discretion. In other words, petitioners are attempting to litigate the question of their former counsel's integrity concurrently in two courts.

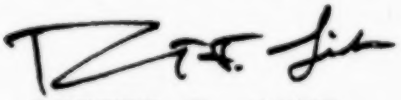
Thus, it is within the sound discretion of this Honorable Court, inasmuch as there is no important constitutional question raised, to deny outright the instant Petition. U.S. Sup. Ct. Rule 19(1), 28 U.S.C.A.

CONCLUSION

For the reasons stated, the decision of the United States Court of Appeals for the Ninth Circuit, which affirms the United States District Court for the District of Nevada in granting a summary judgment against Petitioners herein and for Respondents should be affirmed.

Respondents respectfully suggest that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,



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